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IN THE

Supreme Court of the United States.

October Term, 1961.

No. 734

DELAWARE VALLEY MARINE SUPPLY COMPANY,
Petitioner,

v.

THE AMERICAN TOBACCO COMPANY; PHILIP MORRIS, INCORPORATED; LIGGETT & MYERS TOBACCO COMPANY; P. LORILLARD COMPANY; LIPSCHUTZ BROS., INC.; JANIS LIPSCHUTZ, Executrix of the Estate of Albert Lipschutz, Deceased; JANIS LIPSCHUTZ; MORTON LIPSCHUTZ; MAE LIPSCHUTZ,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Delaware Valley Marine Supply Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on December 8, 1961, which affirmed the judgment of the District Court for the Eastern District of Pennsylvania, directing verdicts in favor of respondents under Rule 50(b).

OPINION BELOW.

The opinion of the Court of Appeals (Appendix A, *infra*, pp. 1a-16a) is not reported. The opinion of the District Court (373a-388a) [1] is reported at 184 F. Supp. 440.

1. References are to the Appendix for Appellant printed for the Court of Appeals. Pursuant to Rule 21(4) of this Court, petitioner

JURISDICTION.

The judgment of the Court of Appeals was entered on December 8, 1961 (Appendix B, *infra*, pp. 17a-18a). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

In a private antitrust suit charging concerted refusal to deal—does circumstantial evidence which shows consciously parallel business practices on the part of respondents create a *prima facie* case on the issue of conspiracy under the Sherman Act?

STATUTES INVOLVED.

The statutes involved are Sections 1 and 2 of the Sherman Act (26 Stat. 209, 15 U. S. C. §§ 1 and 2); and Section 4 of the Clayton Act (38 Stat. 731, 15 U. S. C. § 15). Their pertinent provisions are set forth in Appendix C, *infra*, pp. 19a-20a.

STATEMENT.

Petitioner, having obtained all necessary federal and state licenses, sought to engage in business as a sea stores tobacco distributor, selling cigarettes "in bond" to vessels engaged in the foreign trade. Petitioner sought to enter this business in the Port of Philadelphia where one, and only one, such distributor was permitted to sell the brands of all five respondent cigarette manufacturers. Petitioner

has filed with this petition nine additional copies of the record printed for consideration of the Court of Appeals, which consists of (a) Appendix for Appellant (1a-390a); (b) Appendix for Appellees (1b-821b); and (c) Appendix to Appellant's Reply Brief (391a-842a).

never commenced business because it could not obtain cigarettes for resale.

As a result of the refusal of the manufacturer respondents to sell it cigarettes, petitioner brought the present suit, charging (19a-23a) violations of Sections 1 and 2 of the Sherman Act on the part of the cigarette manufacturer respondents together with the sole distributor in the Port. Petitioner complained that the monopoly position of this distributor in the Port and petitioner's foreclosure from the market resulted from an unlawful conspiracy on the part of all respondents.

The trial commenced on December 3, 1959. Respondents moved to dismiss at the close of petitioner's case, which motions were argued on December 23, 1959 (9a) and denied (321a) by the District Court. The District Court observed:

> . . . I had prepared an opinion which dealt with the matter of prima facie proof of conspiracy, and in that opinion, which has not been filed . . . is the view that there had been prima facie proof of a conspiracy made out . . . (252a).

Respondents moved for directed verdicts at the conclusion of the trial, which motions were argued on January 18, 1960, and also denied by the District Court (13a).

On January 21, 1960 the District Court submitted all issues to the jury; after more than six hours of deliberation[2] the jury announced its inability to arrive at a unanimous verdict, and was discharged.

Respondents filed post-trial motions for directed verdicts under Rule 50(b) (364a-372a). After argument held on three days, the District Court on June 9, 1960 granted these motions because of its then view that petitioner had

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2. The record consists of 3,855 pages of testimony and 266 exhibits; during its deliberations the jury had the 135 exhibits which were received into evidence (308a).

failed to present a sufficient *prima facie* case on damages (373a-388a).

Petitioner appealed to the Court of Appeals seeking review of the correctness of the District Court's decision involving the issue of damages. Respondents, however, urged upon the Court of Appeals the alternative contention (not passed on by the District Court) that petitioner had failed to present a sufficient *prima facie* case on the issue of conspiracy because petitioner had failed to present evidence of conscious parallelism.[3]

The Court of Appeals (expressing no view as to the District Court's decision on damages) rejected respondents' contention that petitioner had failed to show conscious parallelism. The Court of Appeals held, however:

> . . . we do conclude that there is in the record some evidence from which a jury would be entitled to infer that each of the tobacco companies was aware of the action taken by each of the others.

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3. In the Court of Appeals respondents argued in their brief that petitioner had failed to prove conscious parallelism, saying:

> At the trial of this case *plaintiff failed to prove* action on the part of any of the defendants which was either *consciously parallel* or parallel in any significant degree (Brief for Appellees, p. 25). (Emphasis added.)

> There is no evidence in the present case that any tobacco manufacturer acted on plaintiff's application *with knowledge or awareness of the action which any other tobacco manufacturer was going to take.* In fact, the record is devoid of evidence that when any tobacco manufacturer turned down plaintiff, it was even aware that plaintiff had made application to others (*Id.* p. 26). (Emphasis added.)

> *In sum*, there was no evidence from which the jury reasonably could have concluded that any one tobacco manufacturer *was aware of the action which any other tobacco manufacturer was taking or intended to take on plaintiff's application.* Such a conclusion could have been founded only on speculation. *Since knowledge is a prerequisite to the application of the concept of conscious parallelism*, a jury's use of that concept as a basis for inferring conspiratorial conduct would have been wholly unwarranted (*Id.* p. 27). (Emphasis added.)

Thus the evidence in the record is *sufficient*[4] to support a finding by a jury of *conscious parallelism* but in this case consciously uniform business behavior of the kind shown, standing alone, *is not enough to sustain a finding of conspiracy.* The situation at bar was not of a sort which allowed much scope of action to the participants. The tobacco companies of course could say whether they would or would not put the plaintiff on their tax-free lists, in effect licensing it to make sales to ships in the Port of Philadelphia. But this in reality was simply saying "Yes" or "No". Here the five tobacco companies all said "No". The suspicion which would be created by the unlikelihood of numerous firms reaching one of many possible conclusions is lacking and therefore the unanimity of the tobacco companies' rejections of the plaintiff's applications can afford no substantial basis for an inference of conspiracy. The asserted significance of unanimity of rejection becomes evanescent when one remembers that it is the plaintiff itself which so strongly asserts that to be successful in this type of ship chandlery[5] the chandler must have available for sale all major brands of cigarettes, this assertion being concurred in by most of the defendants.[6] It follows that if each tobacco company knew,[6] as the plaintiff so forcibly asserts, that the others would not supply cigarettes to the plaintiff the sale of one brand of cigarettes to it by one of the to-

4. Emphasis added to all quotations unless otherwise indicated.

5. Petitioner sought to operate as a sea stores tobacco distributor, not as a ship chandler. There were a number of ship chandlers in the Port; their business involves the sale of meat, provisions, equipment and the like.

6. Petitioner contends that this consideration in no way negates the permissive inference of conspiracy. Petitioner further contends that two of the manufacturer respondents permitted one of the ship chandlers in the Port to sell their brands of cigarettes as part of the conspiracy, knowing that this ship chandler could not really operate as a sea stores tobacco distributor without having access to all brands of cigarettes.

bacco companies would have been a costly and futile gesture. To draw proof of conspiracy from such circumstances is to strain credulity (Appendix A, *infra*, pp. 10a-11a).

The Court of Appeals also noted:

> . . . We are not unmindful that the defendants' *refusal to deal is . . . effective* in *foreclosing* the plaintiff from the sea stores tobacco business . . . (Appendix A, *infra*, p. 15a).

REASONS FOR GRANTING THE WRIT.

The Court of Appeals has taken a position contrary to an important antitrust decision of this Court and contrary to the rulings of four other Courts of Appeals on the same issue. In holding that proof of consciously parallel business practices raises no *permissive* inference of conspiracy, which can be drawn by the trier of fact, the Court of Appeals has decided a significant question which seriously affects private and Governmental antitrust litigation.[7]

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7. Commentators have given considerable attention to the doctrine of conscious parallelism. See the following which were cited in the opinion of the Court of Appeals: Rahl, *Conspiracy and the Anti-trust Laws* 44 Ill. L. Rev. 743 (1950); Note, *Conscious Parallelism—Fact or Fancy?*, 3 Stanford L. Rev. 679 (1951); *Report of the Attorney General's National Committee to Study the Antitrust Laws* (1955); Givens, *Parallel Business Conduct Under the Sherman Act*, 5 Antitrust Bull. 273 (1960); Conant, *Consciously Parallel Action in Restraint of Trade*, 38 Minn. L. Rev. 797; Schwartz, *New Approaches to the Control of Oligopoly*, 109 U. Pa. L. Rev. 31 (1960).

See, in addition to the foregoing: Sorkin, *Conscious Parallelism*, 2 Antitrust Bull. 281; Handler, *Annual Review of Antitrust Developments*, 10 The Record 332 (1955); Note, *The Nature of a Sherman Act Conspiracy*, 54 Col. L. Rev. 1108 (1954); Comment, *Conscious Parallelism in the Pricing of Gasoline*, 32 Rocky Mt. L. Rev. 206 (1960).

1. In *Theatre Enterprises v. Paramount Film Distributing Corp.*, 346 U. S. 537, this Court held that evidence showing conscious parallelism, while sufficient to raise a *permissive* inference of conspiracy, did not *compel* an inference of conspiracy so as to require the direction of a verdict in favor of the private antitrust suitor. The Court of Appeals holding is that the private suitor's reliance upon conscious parallelism—even to make out a *prima facie* case on conspiracy—is misplaced; that conscious parallelism presents a jury question on conspiracy only when the inference of conspiracy is *compelled*.

In *Theatre Enterprises* there was no evidence of conspiracy among the defendant motion picture distributors other than their uniform refusal to give the petitioner first-run films. This Court rejected the argument of petitioner in that case that the mere showing of such uniformity compelled a directed verdict in favor of petitioner. This Court held (as the District Court and the Court of Appeals had each held in that case) that since the evidence could support *either* an inference of conspiracy *or* an inference of independent action on the part of respondents, an issue was present which necessarily[8] had to be submitted to the jury. Against the background of uniform refusal, this Court said in *Theatre Enterprises* (pp. 540-541):

> The crucial question is whether respondents' conduct toward petitioner stemmed from independent decision or from an agreement, tacit or express. To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. . . . But this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior

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8. 201 F. 2d 306, 313 (4th Cir. 1953):

> We think that there was evidence to support both of the inferences drawn by the opposing parties to the case and thus an issue was presented which was *necessarily* submitted to the jury for decision.

itself constitutes a Sherman Act offense. *Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but "conscious parallelism" has not yet read conspiracy out of the Sherman Act* **entirely.** . . . .

The Court of Appeals held that the evidence showed conscious parallelism. While this petition cannot contain a review of the elaborate evidence embodied in the record, suffice it to say that as to each one of the mediate facts which the Court of Appeals has chosen to discuss in its opinion (presumably negating the ultimate inference of conspiracy), the record shows *prima facie* other conflicting mediate facts which support the inference of conspiracy. Further, establishment of all facts was dependent upon the credibility of witnesses. *Gunning v. Cooley*, 281 U. S. 90; *Berry v. United States*, 312 U. S. 450.

Suffice it to say, also, that the elaborate evidence presented was of a nature which, at least, impelled:

—the District Court to deny respondents' motions at the trial;

—the District Court at the trial to hold that a *prima facie* case of conspiracy had been made out;

—the District Court not to place its grant of respondents' motions under Federal Rule 50(b) upon any asserted deficiency in *prima facie* proof of conspiracy; and

—the Court of Appeals to hold that conscious parallelism was shown.

2. The decision of the Court of Appeals conflicts with decisions of the four other Courts of Appeals in antitrust cases. These other Courts of Appeals have held on the same issue that evidence of consciously parallel busines-

behavior does make out a *prima facie* case of conspiracy under the Sherman Act.

a) The decision of the Court of Appeals conflicts with the decision of the Second Circuit in *Nagler v. Admiral Corp.*, 248 F. 2d 319 (2d Cir. 1957). In that case the complaint contained allegations of consciously parallel business behavior on the part of defendants, but no allegation of conspiracy. The Second Circuit said (at p. 325):

> . . . But as to this the *trier of facts* may draw an inference of *agreement* or concerted action from the "*conscious parallelism*" of the defendants' acts . . . as the Supreme Court recognizes. Theatre Enterprises v. Paramount Film Distributing Corp., 346 U. S. 537 . . .[9]

The Second Circuit earlier held in *Bordonaro Bros. v. Paramount*, 176 F. 2d 594 (2d Cir. 1949), that the uniform refusal to deal of defendants in that case, together with evidence of the relative merits of the theatres in question, appeared to it (p. 596):

> . . . *well-designed* to support a prima facie case and carry the issues beyond the defendants' motion to the jury. . . .

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9. The Second Circuit in *Nagler* further noted that (pp. 325-326):

> . . . So in dealing with an antitrust complaint of somewhat similar nature, Judge Smith in an informed decision refused a dismissal because of lack of a clear-cut assertion of concerted activity, since the plaintiff could rest on this conscious parallelism among the defendants. Hathaway Motors v. General Motors Corp., D. C. Conn. 18 F. R. D. 283. . . .

In *Hathaway Motors v. General Motors Corporation*, 18 F. R. D. 283, 285 (D. Conn. 1955), the district court after quoting from this Court's opinion in *Theatre Enterprises*, said:

> It is open to plaintiffs to prove conscious parallelism of business activity. Difficulties of convincing the trier to draw the inference of agreement from the proof of parallelism should not militate against the complaint at this time.

And further (p. 597):

> . . . But it is hard to see what function the *jury* is to serve in these trials *if it is not to be permitted to evaluate just this kind of evidence.*
>
> . . . Where more than one inference can reasonably be drawn from the proof, *it is for the jury to determine the proper one;* the burden of proof of the entire case resting upon the plaintiff does not mean that the *court should so far encroach upon the province of the jury* as to require that one inference should be more thoroughly proven than another if both are reasonable and rational. . . . *So evidence tending to show that an independent exhibitor, operating a theatre at least as desirable as the theatres of the exhibitors affiliated with the major concerns, was refused first-run films for exhibition was held to make out a prima facie case under the antitrust laws in* Bigelow v. RKO Radio Pictures, 327 U. S. 251 . . .

b) The decision of the Court of Appeals conflicts with the decision of the Ninth Circuit in *Standard Oil Co. of Calif. v. Moore*, 251 F. 2d 188 (9th Cir. 1958), where the court held that evidence of consciously parallel business practices was (pp. 210-211):

> . . . admissible circumstantial evidence of an underlying *agreement*, combination or conspiracy concerning such matters. *The probative value of such evidence is for be determined by the trier of the facts.* Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 342 U. S. 537.

The Ninth Circuit in *Flintkote v. Lysfjord*, 246 F. 2d 368 (9th Cir. 1957), also held that when concerted refusal to deal is charged each seller's decision not to deal (p. 376):

> . . . placed in its proper perspective of *circumstances and facts known to the seller, must be judged by the trier of fact*, to determine if it was an innocent and lawful exercise of the seller's private right, or an act which showed knowing participation in an unlawful conspiracy.
>
> *Were it otherwise, there could never be a civil judgment nor any criminal conviction against any manufacturer.* . . .

c) The decision of the Court of Appeals below conflicts with the decision of the Fifth Circuit in *Paramount Film Distributing Corp. v. Applebaum*, 217 F. 2d 101 (5th Cir. 1954), where it said (p. 127):

> We are constrained to comment that the evidence of *conspiracy* on the part of all other appellants is weak . . . . Yet, we are of the opinion that the record as a whole *contains sufficient evidence of "consciously parallelism" and other activities on the part of the distributors in their relations with Paramount Gulf and with appellees to warrant submission to the jury.* . . .

d) The decision of the Court of Appeals conflicts with the decision of the Fourth Circuit in *Pittsburgh Plate Glass Company v. United States*, 260 F. 2d 397 (4th Cir. 1958), where the Court held in a criminal case (involving a higher standard of proof) (pp. 400-401):

> The jury having found PPG guilty of participation in the conspiracy, the applicable rule in judging the sufficiency of the record to sustain the conviction is to consider it in the light most favorable to the prosecution. . . . Since conscious parallel business behavior *per se*[10] does not establish a violation of the Sherman Act, 15 U. S. C. A. 1, et seq., Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 1954, 346 U. S. 537. . . . affirming 4 Cir., 1953, 201 F. 2d 306,

10. Emphasis supplied by the court.

> proof that PPG announced a price rise identical with that announced almost simultaneously by its competitors was not enough by itself to convict. *However, PPG's "conscious parallelism", in light of its apparent close connection with the climax of the conspiracy, reasonably permitted the jury to infer that PPG sent the letters pursuant to an agreement with some or all of the conspirators.* "The proposition is too elementary to require elaboration, that participation in a criminal conspiracy need not be proved by direct evidence. . . ."

3. The burdens which rest upon the private antitrust suitor are heavy. This Court has sought, where possible, not to add to them, in conformity with clear Congressional policy. *Emich Motors Corp. v. General Motors Corp.*, 340 U. S. 558; *Radovich v. National Football League*, 352 U. S. 445.

The antitrust violation involved in the present case is a *per se* violation; by its very nature and character, a group boycott has a monopolistic tendency, and "As such it is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy." *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U. S. 207, 213.

Almost invariably the private antitrust suitor (as well as the Government) must rely for its *prima facie* case of conspiracy upon circumstantial evidence showing consciously parallel business behavior.

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11. In another criminal case the Tenth Circuit referred to the heavy weight to be given to conscious parallelism. In *Morton Salt Co. v. United States*, 235 F. 2d 573 (10 Cir. 1956), the court observed (p. 577):

> It is also true it "has never [been] held that proof of parallel business behavior conclusively established agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense." Theatre Enterprises, Inc. v. Paramount Film Distributing Corp. . . . But that case and others recognize that such behavior is another item to be weighed, *and generally to be weighed heavily, in the determination*. . . .

The present record, we submit, contains circumstantial evidence of conscious parallelism beyond that contained in the record in *Theatre Enterprises.*[12] Yet, the Court of Appeals below held petitioner had no right to go to the jury.

As a result of the decision of the court below it is now well nigh impossible to prove a *prima facie* case of conspiracy in the Third Circuit; further, the same almost insurmountable obstacle has been placed in the path of the Government in its civil and criminal antitrust litigation. For all practical purposes the private suitor has been eliminated as an ancillary force policing the antitrust laws.

CONCLUSION.

A writ of certiorari should be granted.

Respectfully submitted.

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12. Some of the evidence showing the consciously parallel business behavior of respondents, from which the inference of conspiracy was permissible, is referred to in the remarks to the jury of counsel for petitioner. (Appendix to Appellant's Reply Brief, 744a-792a.)

APPENDIX A.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13369

DELAWARE VALLEY MARINE SUPPLY COMPANY,
Appellant,

v.

THE AMERICAN TOBACCO COMPANY, PHILIP MORRIS, INCORPORATED; LIGGETT & MYERS TOBACCO COMPANY; R. J. REYNOLDS TOBACCO COMPANY; P. LORILLARD COMPANY; LIPSCHUTZ BROS., INC.; JANIS LIPSCHUTZ, EXECUTRIX OF THE ESTATE OF ALBERT LIPSCHUTZ, DECEASED; JANIS LIPSCHUTZ; MORTON LIPSCHUTZ; MAE LIPSCHUTZ.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued June 6, 1961

Before BIGGS, *Chief Judge* and HASTIE and FORMAN, *Circuit Judges*

OPINION OF THE COURT

(Filed December 8, 1961)

By BIGGS, *Chief Judge.*

The plaintiff-appellant, Delaware Valley Marine Supply Company, has sued the defendants-appellees, American Tobacco Company, Liggett & Myers Tobacco Company, P. Lorillard Company, Philip Morris, Incorporated and R. J.

Reynolds Tobacco Company (the "tobacco companies"), Lipschutz Bros., Inc. and the individuals named in the title of this cause, alleging violation of Section 1[1][2] of the Sherman Act, 15 U. S. C. A. § 1. The plaintiff seeks treble damages, attorney's fees and injunctive relief. Judgment was entered for all the defendants and the plaintiff has appealed.

The plaintiff, Delaware Valley Marine, is a corporation organized to sell tax-free tobacco products and liquor to vessels engaged in the foreign trade entering the Port of Philadelphia. It applied to the defendant tobacco companies for a "direct listing," to enable it to purchase cigarettes tax-free for resale to ships. All of the tobacco companies[3] declined to sell cigarettes to the plaintiff, and it never commenced to do business. At the time of the tobacco companies' refusals to do business with the plaintiff, all were selling direct to Lipschutz Bros., Inc., an established firm in the business of selling tobacco, whiskey and other supplies to ships in the Port of Philadelphia. In addition Reynolds and Lorillard had a second Philadelphia outlet, M. J. Kelly Company, which was in the business of

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1. The plaintiff's original complaint also alleged violation of Section 2 of the Act, 15 U. S. C. A. § 2. Although a pre-trial stipulation and the record of the case seem to indicate that the Section 2 charge has been abandoned, the plaintiff, in a footnote in its brief before this court, still maintains that the monopoly issue is open. Also, the district court opinion states that the suit is brought for violation of both sections. But it is not necessary to resolve this uncertainty for the Section 2 charge as stated is also dependent upon a finding of conspiracy to refuse to deal, which is the controlling issue in the case with regard to the alleged violation of Section 1.

2. The section states in pertinent part that, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

3. Lorillard has maintained throughout the proceeding that the plaintiff never applied to it to buy cigarettes. The issue of whether an application was made by the plaintiff to Lorillard to purchase cigarettes was considered to be a jury issue by the trial judge and was not decided as will appear. We will assume *arguendo* that Lorillard was contacted and did refuse to sell cigarettes to the plaintiff.

selling a full line of ship supplies. The plaintiff alleges that the tobacco companies acted in concert in restraint of trade and that Lipschutz in effect aided and abetted the conspiracy.

After all of the plaintiff's evidence had been presented the defendants moved for a directed verdict pursuant to Rule 50(a), Fed. R. Civ. Proc., 28 U. S. C. These motions were denied;[4] they were also denied when renewed at the close of all of the evidence. The trial court then submitted all issues to the jury on special interrogatories pursuant to Rule 49(a). After deliberating for five hours the jury was unable to agree on an answer to the first interrogatory[5] and was discharged. All the defendants then moved for judgment in accordance with their earlier motions for directed verdict as authorized by Rule 50(b).

The defendants argued that the plaintiff's case was fatally defective in three respects:[6] (1) that no proof had been introduced from which the jury could find that the plaintiff had such a business or property interest as to give it standing to maintain the suit at bar; (2) that there was no direct evidence of conspiracy and none from which a jury

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4. In denying these motions the court filed an opinion unreported for publication. It stated in part: "Whether the record contains any evidence to support a finding of a conspiracy or of damages are questions which present more difficulty. Within the time limitations under which I have been working I have been unable to review the record with the care or to examine the law with the thoroughness which I consider necessary for a proper disposition of these questions. I have therefore decided to deny the motions. I do so with the thought that if due consideration of the law and the facts after all of the evidence is in should reveal that plaintiff has failed to make out a case, defendants' rights can be adequately protected either prior to jury submission, or thereafter in the event of a jury verdict adverse to defendants, by curative action by me upon timely and appropriate motions which the Rules authorize defendants to file."

5. The first interrogatory was as follows: "Did plaintiff have such business or property as to entitle it to maintain this action?"

6. Certain defendants raised individual reasons for the granting of the motion as to each of them but in view of the disposition we make of the case it is unnecessary to set out these reasons.

could infer that the defendants had conspired; and (3) that there was no proof that the plaintiff had suffered any damage. Reversing the position it had first taken when the motions were made, prior to the submission of the interrogatories to the jury, the trial court granted the defendants' motions to dismiss the action on the ground that the plaintiff had not proved any damage. See 184 F. Supp. 440. As the plaintiff had stated its view that a finding of damage was a necessary basis for the granting of injunctive relief, the trial court refrained from passing on evidence submitted by the plaintiff to prove the conspiracy. In view of the disposition that we make of the litigation it is unnecessary to pass on the issue of whether proof of damages is a prerequisite to obtaining an injunction. In disposing of the Rule 50(b) motions the trial court also ruled that there was evidence from which the jury was entitled to find that the plaintiff had a business within the meaning of Section 4 of the Clayton Act, 15 U. S. C. A. § 15, and therefore possessed the standing to maintain the suit at bar. The defendants have not contested this ruling.

On appeal the plaintiff urges that the trial court's ruling on damages was erroneous. The defendants contend that it was not and assert also that the plaintiff failed to produce any evidence of conspiracy and that therefore the motions for directed verdict in their favor must be granted.[7]

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7. In its reply brief, the plaintiff urges that the issue of conspiracy is not properly before this court. Various grounds are presented in support of this contention: (1) that the failure of the defendants to cross-appeal bars consideration of the issue; (2) that the defendants flagrantly violated Rule 24 of this court by deliberately presenting an incomplete appendix: *i.e.* one that does not give all of the evidence in the case which is favorable to the plaintiff; (3) that the defendants have violated Rule 24 also by failing to provide a precise chronofogical statement of the facts necessary to decide the conspiracy issue; and (4) that this court will not rule on an issue which has not been decided by the district court. The plaintiff's objections (1) and (4) must be rejected on the basis of the Supreme Court's *per curiam* opinion in Jaffke v. Dunham, 352 U. S. 280 (1957), the relevant language of which has been recognized and applied in this circuit, Zegan v. Central R. R. Co., 266 F. 2d 101, 103 (1959). In

On motions for a directed verdict in favor of the defendants the evidence must be considered in the light most favorable to the plaintiff and it is entitled to the benefit of all inferences which can reasonably be drawn from the

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Jaffke, 352 U. S. at 280-281, the Court stated: "We granted certiorari in this case to review a judgment of the Court of Appeals . . . reversing an order of the District Court . . . sitting in bankruptcy, which required respondent as trustee of a bankrupt's estate to pay $27,400 to petitioner. . . . On appeal, the Court of Appeals held that petitioner had failed to prove that any specific portion of the money that he had given the bankrupt became a part of the funds in the hands of respondent. Because petitioner had not cross-appealed, the Court of Appeals held that it could not consider the action of the District Court in striking the bankrupt's affidavit from the record. A successful party in the District Court may sustain its judgment on any ground that finds support in the record. If the District Court was in error in striking an admissible affidavit, a cross-appeal was not a prerequisite for the Court of Appeals to rule on the admissibility of the affidavit, and finding it admissible, to find that it afforded evidence in support of the District Court judgment." In the Zegan case, this court applied the Jaffke rule in an appeal from a judgment for defendant under Federal Rule of Civil Procedure 50(b) and considered an argument not passed on by the court below—precisely the situation presented by the instant appeal.

In respect to objections (2) and (3), although the defendants do not ignore all of the plaintiff's evidence, it is true that the statement of facts and the appendix do omit some of the testimony offered by the plaintiff which would tend to show the tobacco companies to have been interested in and aware of what their competitors were doing in respect to applications for direct listing. The defendants' appendix also neglected to include evidence relating to earlier rejections by the tobacco companies of applications for direct listings. The court had the possibility of omissions like these in mind when it provided for a reply brief and appendix. See our Rule 24(5). By this rule the adversary party can make sure that there is brought to the attention of the court all evidence deemed pertinent. The plaintiff has taken full advantage of this opportunity in the case at bar. We think we should not bar consideration of the defendants' motions to dismiss the action on the ground that the evidence is insufficient to sustain the charge of conspiracy. No prejudice has resulted to the plaintiff from the defendants' insufficient reproduction of the record in their appendix.

8. We have called these "motions for a directed verdict". Technically they are motions to enter judgment for the respective defendants pursuant to Rule 50(b).

record in its behalf. So viewing the case we conclude that the judgment below must be affirmed because of the failure of the plaintiff to produce evidence from which a jury would be entitled to infer that the defendants had conspired in refusing to deal with the plaintiff.

In so concluding we are aware of the difficulties of proof of modern antitrust conspiracy and that the difficulties increase as the number of conspirators lessens.[9] It is certainly true that "the picture of conspiracy as a meeting by twilight of a trio of sinister persons with pointed hats close together belongs to a darker age."[10] But it is the fact that conspiracy remains an essential ingredient of a case based on Section 1. Conscious parallelism, relied on heavily by the plaintiff here, is of aid in demonstrating the existence of sophisticated and silent agreements which so often have injuriously restrained trade. But conscious parallelism is not yet a conclusive legal substitute for proof of conspiracy.[11] It is circumstantial evidence the probative value of which necessarily varies with the kind of parallelism and the factual setting where it is found.[12] Some business practices may provide strong evidence of agreement: sealed bids for 6,000 barrels of cement, for example, from eleven firms, identical to the fraction of a cent, could hardly be coincidence.[13] The inference of agreement is strengthened if the participants are many and if they comprise a non-oligopolistic industry, where the economic pressures forcing action and reaction with competitors are absent. But, as we

9. See Rahl, Conspiracy and the Anti-Trust Laws, 44 Ill. L. Rev. 743, 757 (1950).

10. Ball v. Paramount Pictures, Inc., 169 F. 2d 317, 319 (3 Cir. 1948), *cert. denied*, 339 U. S. 911 (1950).

11. Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U. S. 537 (1954). See Note, Conscious Parallelism—Fact or Fancy? 3 Stanford L. Rev. 679 (1951).

12. Report of the Attorney General's National Committee to Study the Antitrust Laws 39-40 (1955).

13. Cf. F. T. C. v. Cement Institute, 333 U. S. 683, 713 n. 15 (1948).

stated in Milgraft v. Loewe's, Inc., 192 F. 2d 579, 583 (3 Cir. 1951), *cert. denied*, 343 U. S. 929 (1952): "This does not mean . . . that in every case mere consciously parallel business practices are sufficient evidence, in themselves, from which a court may infer concerted action." We think this case falls within the category that we recognized in our dictum in Milgram, the category in which conscious parallelism is not enough.

As is usual in Section 1 cases, the plaintiff here offers no direct proof of conspiracy. In effect, all of the direct evidence is to the contrary for all the defendants have denied expressly the existence of any agreement. The plaintiff's case at its best can be summed up as follows: In January or February, 1956, Drew J. T. O'Keefe, Esquire, a member of the Pennsylvania Bar, who was one of the parties interested in forming the plaintiff corporation,[14] contacted two local tobacco company representatives, Beckwith of Philip Morris and Comey of Reynolds. During the ensuing discussions, conducted separately, O'Keefe asked to purchase cigarettes and indicated that he intended to get in touch with all major cigarette manufacturers. Both Beckwith and Comey refused the applications but stated that their principals probably would sell to the plaintiff if it obtained other brands of cigarettes for sale. No additional contacts were made with any of the defendants until July, 1956, some weeks subsequent to the incorporation of the plaintiff. At this time letters of application were sent to at least three of the tobacco companies, PM, American and Liggett & Myers. Reynolds and Lorillard claimed that these letters were not received by them and were not mailed. Receiving no response, the plaintiff sent registered letters to

14. The persons who created the plaintiff and were its principal stockholders were Mr. O'Keefe, Walter E. Knecht, Jr., Esquire, Mr. O'Keefe's law partner, Mr. Edward J. Conway, Chief Deputy United States Marshal for the Eastern District of Pennsylvania, Mr. H. Lawrence Clark, a Deputy United States Marshal, Eastern District of Pennsylvania, and Mrs. Mary Jane Hoffman, a school teacher of Cape May, New Jersey.

these three defendants on August 21, 1956, offering to buy C. O. D.; and asserts that it sent identical registered letters to the other two tobacco company defendants. Reynolds and Lorillard contend that they did not receive these letters. We will assume *arguendo* that there was sufficient evidence offered by the plaintiff to prove to the jury that the plaintiff's letters were mailed by it to Lorillard and received by that company. As stated, O'Keefe previously had made direct contact with a representative of Reynolds and had tried to purchase cigarettes from that company.

In the interval between the letters, *i. e.*, between July 7 and August 21, Clark, who was to be the plaintiff's manager, saw Miss Tooher, who was in charge of tax-free sales at L&M, at the company's New York office. He was informed that L&M did not wish to add another distributor in Philadelphia at that time. On the same day that Clark saw Miss Tooher he had an interview with Turner, secretary of Philip Morris Overseas. Clark was encouraged after this visit, although PM did not commit itself. PM was the only tobacco company with which the plaintiff had any contact after the letter of August 21, 1956. During the first part of 1957, PM made a thorough investigation of the plaintiff and decided not to alter its earlier decision of rejection. For the purposes of this decision we will assume that it is a fact that all of the defendant tobacco companies rejected the plaintiff's applications for direct listing. The defendants urge that there can be no finding of parallelism because the manner of rejection was not uniform: L&M and American denied the application by letter without any investigation; Lorillard and Reynolds did not even answer the letters; PM adhered to its earlier decision but only after extensive investigation and consideration. But the defendants cannot escape the impact of the antitrust laws so easily.[15] If it were otherwise

15. The defendants rely on Independent Iron Works, Inc. v. United States Steel Corp., 177 F. Supp. 743, 746 (D. C. N. D. Cal.

a charge of conspiracy could always be avoided by agreeing to go home by different roads. The plaintiff's case, of course, would be the stronger if it could show that all the tobacco company defendants had rejected the plaintiff's applications in the same way: *vide*, the automatic refusal to deal of Milgram v. Loew's *supra*. But there was uniformity of action on a crucial point: all the corporate defendants denied the plaintiff's applications. If there are sufficient other facts and inferences which can be drawn from the record from which the jury might reasonably find concerted action, the plaintiff will not be prevented from recovery simply because of differences in the ways in which its applications were rejected by the defendants.

The issue of whether there is evidence from which a jury could find that the defendants or some of them knew that other defendants had or would reject the plaintiff as a purchaser is a troublesome one. All of the defendants, save PM, deny that they had knowledge that the plaintiff's application had been or would be denied by any other defendant tobacco company. During 1957, PM, in adhering to its earlier decision not to place the plaintiff on its direct sales list, was aware of the fact that the plaintiff had experienced difficulty in obtaining cigarettes from other companies. The plaintiff's representatives testified that they disclosed this fact to PM's representatives in an interview

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1959). The court stated: "In deciding whether evidence of defendants' conduct can reasonably support an inference of conspiracy, there must be more than mere general similarities; there must be a sameness of conduct under circumstances which logically suggest joint agreement, as distinguished from individual action." But the court did not say that parallelism in detail was a *sine qua non* of a plaintiff's case; it went on to note that there was no other circumstantial evidence pointing to conspiracy. If a contrary interpretation of the court's holding is to be drawn from the statement at p. 749, that "as soon as generalities are put aside, the many divergencies in the defendants' practices show such a lack of 'parallel conduct' as to negate any inference of agreement", we decline to follow it.

in 1957:[16] Although we do not find the testimony of the other defendants' witnesses to the effect that they were not aware of the rejections by the other tobacco companies of the plaintiff's applications "incredible" as we did in Ball v. Paramount Pictures, Inc., 169 F. 2d 317, 320-21 (3 Cir. 1948), *cert. denied*, 339 U. S. 911 (1950), we do conclude that there is in the record some evidence from which a jury would be entitled to infer that each of the tobacco companies was aware of the action taken by each of the others.

* * * Thus the evidence in the record is sufficient to support a finding by a jury of conscious parallelism but in this case consciously uniform business behavior of the kind shown, standing alone, is not enough to sustain a finding of conspiracy. The situation at bar was not of a sort which allowed much scope of action to the participants. The tobacco companies of course could say whether they would or would not put the plaintiff on their tax-free lists, in effect licensing it to make sales to ships in the Port of Philadelphia. But this in reality was simply saying "Yes" or "No". Here the five tobacco companies all said "No". The suspicion which would be created by the unlikelihood of numerous firms reaching one of many possible conclusions is lacking and therefore the unanimity of the tobacco companies' rejections of the plaintiff's applications can afford no substantial basis for an inference of conspiracy. The asserted significance of unanimity of rejection becomes evanescent when one remembers that it is the plaintiff itself which so strongly asserts that to be successful in this type of ship chandlery the chandler must have available for sale all major brands of cigarettes, this assertion being concurred in by most of the defendants.[17] It follows that if each

16. The plaintiff's representatives, O'Keefe and Clark, had interviews in 1957 with Philip Morris's representatives but not with those of the other tobacco companies.

17. Lorillard was not asked the question as to whether or not all brands of cigarettes were required for successful selling of the sort contemplated by the plaintiff. American made it clear that it "had no objection to" the distributor selling all brands.

tobacco company knew, as the plaintiff so forcibly asserts, that the others would not supply cigarettes to the plaintiff the sale of one brand of cigarettes to it by one of the tobacco companies would have been a costly and futile gesture. To draw proof of conspiracy from such circumstances is to strain credulity.

The fact that the plaintiff offered to buy C. O. D. and that this offer was rejected has no real probative value here. The letters of July 7 and August 21, 1956 do not furnish any substantial indications of the plaintiff's financial responsibility. Even when we consider that matter to which the plaintiff seemingly attaches great importance, viz., complaints to the tobacco companies about Lipschutz and dislike of Lipschutz along the waterfront,[18] we are still of the opinion that the evidence falls short of the minimum necessary to support a finding of conspiracy.

To hold to the contrary would be to allow speculation by the jury for we can find no additional circumstances which would tend to cast suspicion on the defendants' rejections of the plaintiff's applications as an exercise of independent judgment. The circumstances of the case at bar afford a striking contrast to those of cases in which findings of conspiracy have been premised on the doctrine of conscious

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18. The record discloses but two instances of complaints by buyers. Both were brought to the attention of L&M by a competitor of Lipschutz. The testimony is undisputed that an explanation satisfactory to L&M was given to L&M by Lipschutz. There is also a showing that PM had information that other ship chandleries on the waterfront disliked Lipschutz and that PM's waterfront representative did not feel that Lipschutz was giving to selling PB brands an effort equal to that given by Lipschutz to selling some other brands. If this be evidence which demonstrates unreasonableness in PM's refusal to sell to the plaintiff there was none of a similar nature introduced against the other tobacco companies who dealt only with Lipschutz. The charge laid in the complaint is conspiracy under Section 1 of the Sherman Act. The evidence just referred to goes only to PM's refusal to sell to the plaintiff and cannot support the conspiracy charge.

parallelism.[19] The plaintiff contends that the reason given here by the defendant tobacco companies for their refusals to license the plaintiff were false as the District Court implied in Milgram, 192 F. 2d 579, at p. 585. But the tobacco companies[20] stated in effect that their representation in the Port of Philadelphia was adequate and that the information disclosed by investigation and the plaintiff's applications did not indicate that it had the experience, financial responsibility and other attributes which would qualify it as a potentially successful distributor. These statements find full support in the record. In 1956, three companies, viz., PM, L&M, and American, with only one outlet did seven-eighths of the total business transacted in the Port of Philadelphia, and each had substantial increases in busi-

19. Milgram v. Loew's, Inc., 192 F. 2d 579 (3 Cir. 1951), *cert. denied*, 343 U. S. 929 (1952); Bordonaro Brothers Theatres, Inc. v. Paramount Pictures, Inc., 176 F. 2d 594 (2 Cir. 1949); Ball v. Paramount Pictures, Inc., 169 F. 2d 317 (3 Cir. 1948), *cert. denied*, 339 U. S. 911 (1950); William Goldman Theatres, Inc. v. Loew's, Inc., 150 F. 2d 738 (3 Cir. 1945), *cert. denied*, 334 U. S. 811 (1948); see Givens, Parallel Business Conduct under the Sherman Act, 5 Antitrust Bull. 273, 279 (1960). In other cases utilizing the theory of conscious parallelism to find conspiracy, at least two of the following three circumstances are present: "plus" factors such as those emphasized in the simple refusal to deal cases, *supra*; parallelism of a much more elaborate and complex nature; a web of circumstantial evidence pointing very convincingly to the ultimate fact of agreement. With the above cited cases compare United States v. Paramount Pictures, Inc., 334 U. S. 131 (1948); F. T. C. v. Cement Institute, 333 U. S. 683 (1948); United States v. United States Gypsum Co., 333 U. S. 364 (1948); American Tobacco Co. v. United States, 328 U. S. 781 (1946); United States v. Masonite Corp., 316 U. S. 265 (1942); Interstate Circuit, Inc. v. United States, 306 U. S. 208 (1939); Pittsburg Plate Glass Co. v. United States, 260 F. 2d 397 (4 Cir. 1958), *aff'd*, 360 U. S. 395 (1959); Morton Salt Co. v. United States, 235 F. 2d 573 (10 Cir. 1956); C-O-Two Fire Equipment Co. v. United States, 197 F. 2d 489 (9 Cir.), *cert. denied*, 344 U. S. 892 (1952); Homewood Theatre, Inc. v. Loew's, Inc., 110 F. Supp. 398 (D. C. Minn. 1952).

20. That is to say, all the tobacco companies, save Lorillard. There is no evidence as to why Lorillard refused to sell to the plaintiff but cf. note 3, *supra*.

ness over the previous year. Reynolds and Lorillard, although far behind the three leaders, had recently engaged a second distributor and their sales were increasing. Many of the decisions in which courts find conspiracy on the basis of circumstantial evidence do so because the defendants acted in apparent contradiction of their own economic self-interest. In such cases there was evidence that the plaintiff had made a better offer than did those with whom the defendant was currently doing business,[21] or that the plaintiff's place of business was superior to that supplied by the defendant.[22] No better offer was proven here, nor was it shown that the plaintiff could provide facilities equal to those of Lipschutz or Kelly. In William Goldman Theatres, Inc. v. Loew's, Inc., 150 F. 2d 738 (3 Cir. 1945), *cert. denied*, 334 U. S. 811 (1948), one of the defendant distributors had a 100% monopoly on first-run exhibition in Philadelphia. This distributor sought to continue the monopoly which inured to his benefit. Other distributors cooperated, apparently in return for similar favorable treatment elsewhere.[23] The defendant manufacturers in this case have no interest in the existing agency accounts of Lipschutz or Kelly. Goldman emphasized the fact that the defendants did not place any responsible executives on the stand to rebut the allegation of conspiracy, 150 F. 2d 738, at p. 743; there was no silence here. In the Ball case, *supra*, 169 F. 2d 317, at p. 319, the plaintiff introduced evidence that one of the defendant distributors stated that it would use all of its influence to see that other distributors sent their first-run films to the defend-

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21. *E.g.*, Ball v. Paramount Pictures, Inc., 169 F. 2d 317, 319 (3 Cir. 1948), *cert. denied*, 339 U. S. 911 (1950).

22. *E.g.*, Bordonaro Brothers Theatres, Inc. v. Paramount Pictures, Inc., 176 F. 2d 594, 597 (2 Cir. 1949). Compare Brown v. Western Massachusetts Theatres, Inc., 288 F. 2d 302, 304-5 (1 Cir. 1961).

23. See Milgram v. Loew's, Inc., 192 F. 2d 579, 585 (3 Cir. 1951), *cert. denied*, 343 U. S. 929 (1952).

ant theater, in which it had a 50% interest. The plaintiff offers no evidence of coercion arising from the facts in the instant case. In Milgram, this court attached some importance to the decision in United States v. Paramount Pictures, Inc.,[24] involving a conspiracy similar to that which was alleged in Milgram and which had been decided against the defendants, the same persons in fact as were the defendants in the Milgram case. See 192 F. 2d 579 at pp. 583-584. The defendants in the case at bar, unlike those in Milgram, do not suffer from the disability of such a prior adverse judgment.

Two other factors deserve mention. In the Milgram case, we held that the district court judge was justified in taking into consideration the fact that the eight defendants rejected the plaintiff without giving the matter serious consideration. 192 F. 2d 579, at p. 585. The plaintiff urges that the denials were automatic in this case also. This argument is not available against PM, which gave the plaintiff's application thorough consideration. There is no evidence to indicate what attention was accorded the plaintiff's offer in the case of Reynolds and Lorillard, assuming, as we have assumed, that they received O'Keefe's letters.[25] White, the export manager of American, had the issue of licensing the plaintiff under consideration for two days, according to his uncontradicted testimony. The evidence does suggest that L&M's denial was perhaps automatic, but L&M's position in the market strips this of any sinister significance. At the time L&M was selling the large proportion of 42% of the dollar volume in the Port of Philadelphia; in addition, its most recent experience with a sea

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24. 66 F. Supp. 323 (D. C. S. D. N. Y. 1946), *modified*, 334 U. S. 131 (1948), *on remand*, 85 F. Supp. 881 (D. C. S. D. N. Y. 1949).

25. The Reynolds' contact with the plaintiff through its local representative, Comey, was not "automatic" in nature. The record shows that the meeting lasted approximately 45 minutes, and that Comey gave O'Keefe a full hearing.

stores selling agency other than Lipschutz had ended with the bankruptcy of the firm in 1951. Finally, the plaintiff seeks support for a finding of conspiracy in the fact that the defendants had adhered to the policy of rejection in the past. Of course this argument cannot be applied to Reynolds and Lorillard who had in fact accepted a direct account other than Lipschutz. There are only three instances in the record, other than the plaintiff's application, in which at least two of the defendants refused to deal with applicants. L&M and American rejected all three; PM rejected one. As is the case with the rejection of the plaintiff, economic circumstances prevent these denials from serving as bases for inferences of agreement. L&M, American and PM were the three dominant firms in the market, and all were doing very well with Lipschutz at the times of the applications. We do not think that such infrequent action can show conspiracy. On the basis of this record, giving the plaintiff the accumulative benefit of all facts in its favor and of all logical and reasonable inferences to be drawn therefrom, we are forced to conclude that the plaintiff has failed to produce evidence sufficient to support a jury finding of conspiracy.

In so deciding, we are not unmindful that the defendant's refusal to deal is as effective in foreclosing the plaintiff from the sea stores tobacco business as an agreement to do so would be. It has been argued that such uniform decisions, made under economic circumstances tending to make the act of one firm or company dependent upon the reaction of others, violate Section 1 even though conspiracy is absent.[26] With this we cannot agree. Section 1 specifies means as well as ends. Perhaps as a matter of public policy restraint of trade *per se* should be controlled[27] but conspiracy is required in this case.

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26. See Conant, Consciously Parallel Action in Restraint of Trade, 38 Minn. L. Rev. 797, 814-25 (1954).

27. See Rahl, *supra*, note 9, at pp. 759-62; Schwartz, New Approaches to the Control of Oligopoly, 109 U. Pa. L. Rev. 31 (1960).

What we have said in respect to the defendant tobacco companies renders it unnecessary to deal with the contentions of Lipschutz Bros., Inc. and of the individual defendants or to discuss the grounds upon which the court below rendered judgment.

The judgment will be affirmed.

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especially pp. 39-41. Cf. the English imposition of direct control of oligopolistic restraint of competition, regardless of the means of restraint, Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948, 11 & 12 Geo. 6, ch. 66, §§ 3(2), 4(2).

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,369

DELAWARE VALLEY MARINE SUPPLY COMPANY,
Appellant,

v.

THE AMERICAN TOBACCO COMPANY; PHILIP MORRIS, INCORPORATED; LIGGETT & MYERS TOBACCO COMPANY; R. J. REYNOLDS TOBACCO COMPANY; P. LORILLARD COMPANY; LIPSCHUTZ BROS., INC.; JANIS LIPSCHUTZ, EXECUTRIX OF THE ESTATE OF ALBERT LIPSCHUTZ, DECEASED; JANIS LIPSCHUTZ; MORTON LIPSCHUTZ; MAE LIPSCHUTZ.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: BIGGS, *Chief Judge*; and HASTIE and FORMAN, *Circuit Judges*.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

IDA O. CRESKOFF,
Clerk.

December 8, 1961

APPENDIX C.

Section 1 of the Sherman Act [15 U. S. C. § 1]

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 2 of the Sherman Act [15 U. S. C. § 2]

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000 or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 4 of the Clayton Act [15 U. S. C. § 14]

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

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Office Supreme Court, U.S.
FILED
MAR 20 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1961.

No. 734.

DELAWARE VALLEY MARINE SUPPLY COMPANY,
Petitioner,

v.

THE AMERICAN TOBACCO COMPANY; PHILIP MORRIS, INCORPORATED; LIGGETT & MYERS TOBACCO COMPANY; R. J. REYNOLDS TOBACCO COMPANY; P. LORILLARD COMPANY; LIPSCHUTZ BROS., INC.; JANIS LIPSCHUTZ, Executrix of the Estate of Albert Lipschutz, Deceased; JANIS LIPSCHUTZ; MORTON LIPSCHUTZ; MAE LIPSCHUTZ,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1961.

No. 734.

DELAWARE VALLEY MARINE SUPPLY COMPANY,
Petitioner,

v.

THE AMERICAN TOBACCO COMPANY; PHILIP MORRIS, INCORPORATED; LIGGETT & MYERS TOBACCO COMPANY; R. J. REYNOLDS TOBACCO COMPANY; P. LORILLARD COMPANY; LIPSCHUTZ BROS., INC.; JANIS LIPSCHUTZ, EXECUTRIX OF THE ESTATE OF ALBERT LIPSCHUTZ, DECEASED; JANIS LIPSCHUTZ; MORTON LIPSCHUTZ; MAE LIPSCHUTZ,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

QUESTION PRESENTED.

Is there any reasonable basis for inferring, in the absence of any direct evidence, that several manufacturers, each of whom may have been aware of the action taken by the others,[1] acted pursuant to a conspiracy when each of them rejected the request for a distributorship of a newly-formed enterprise which did not present the experience, resources, or other attributes of a potentially successful distributor and neither the particular business setting nor any other circumstance indicated that the manufacturers' rejections were made other than in the exercise of their own independent business judgments?

STATEMENT OF THE CASE.

This antitrust action for treble damages, predicated on the theory that the tobacco manufacturer respondents refused to deal with petitioner as the result of a conspiracy in which the Lipschutz respondents [2] participated, was insti-

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1. The court below concluded that there was "some evidence" to support an inference that "the tobacco companies were aware of the action taken by each of the others" (Appendix A, p. 10a). On this premise the Petition presents only the question of what further inference may be drawn from consciously uniform business behavior, i.e., the several refusals to deal. If *certiorari* were granted respondents would question, as they did below, whether there was any refusal to deal on the part of Lorillard and R. J. Reynolds, whether there was evidence of consciously uniform business behavior by the tobacco manufacturers, and whether there was any evidence to show participation by the Lipschutz respondents in the alleged conspiracy. In addition, respondents would raise the question (not reached in the court below, but ruled in respondents' favor by the trial court) whether the judgment should be affirmed because petitioner failed to prove it was damaged.

2. The complaint named Lipschutz Bros., Inc., Albert Lipschutz, Janis Lipschutz, Morton Lipschutz and Mae Lipschutz. Albert Lipschutz died just before trial and his executrix was substituted. The case was dismissed, during trial, as to Janis and Mae Lipschutz and petitioner did not challenge that dismissal in the court of appeals.

tuted in July of 1957. Petitioner had obtained a Pennsylvania Certificate of Incorporation in March of 1956, but it never actually engaged in business. Following incorporation it procured Federal and Pennsylvania licenses to make tax-free sales of bonded tobacco and liquor to ships engaged in foreign trade[3] and claimed to have obtained an oral lease of office and warehouse space (66b); but the only funds it ever possessed were $500 and it never issued any stock, paid any rent, installed any furniture or equipment, or employed any personnel (179b; Ex. R-3, 737b; 66b; 71b; 56a, 84b).

Petitioner's promoters and prospective stockholders[4] were two partners in a Philadelphia law firm, two Deputy United States Marshals and a school teacher, none of whom had ever had any experience in the business for which petitioner was incorporated and licensed (4b-5b; 77b, 184b). Early in 1956, prior to incorporation, one of the Philadelphia lawyers inquired, separately, of the local representatives of Reynolds and of Philip Morris whether each of their companies would supply bonded tobacco products; each replied in the negative (34a-40a). Following incorporation, one of the Deputy Marshals visited the New York office of Liggett & Myers where he was advised that it was adequately represented in the port of Philadelphia (155b-157b). Later the same day he called on Philip Morris and was told that it would investigate (157b-158b). These were petitioner's only personal contacts with respondents during all of 1956.

In July of 1956, the lawyer-promoter, using the letterhead of his law firm, wrote identical letters to Liggett &

3. The sale of these and other supplies to ships engaged in foreign trade, for resale to crew members, is commonly referred to as the sea stores business.

4. No share certificates were ever issued (40b). It was planned that the shares of the United States Marshals if and when issued, would be held by their wives since ". . . it would be better that [their wives] be the stockholders because of their positions with the Federal Government" (41b).

Myers, American, and Philip Morris requesting their products for his "client" (Exs. P-12, 700b; P-19, 705b; P-31, 713b). In August he sent to each of them a registered mail follow-up and, in due course, each of them declined petitioner's request[5] (Exs. P-14, 702b; P-20, 706b; P-32, 714b; P-15, 703b; P-21, 707b; P-33, 715b).

Thereafter, petitioner's only efforts to obtain cigarettes from any tobacco manufacturer, as shown by the evidence, occurred in 1957 at a series of meetings with representatives of Philip Morris (41a-46a). Petitioner's position was that to be successful it needed all brands of cigarettes and did not wish to handle only Philip Morris products (123b-124b, 161b), yet petitioner had ceased its efforts to secure the products of other manufacturers.

Undisputed evidence in petitioner's case showed the history of the sea stores tobacco business in Philadelphia, which was the setting for the business decisions of the several respondents. For many years Liggett & Myers, American and Philip Morris had dealt with respondent, Lipschutz Bros., as their sea stores distributor in the port of Philadelphia (204b, 250b, 256b, 258b). Reynolds and Lorillard had also dealt with Lipschultz but, prior to the formation of petitioner, they had, in addition, begun to sell to another distributor (80b; Exs. P-56A, 720b; P-79, 727b). Several other distributors had dropped out of the business prior to World War II (218b-219b). A sea stores outlet which started in 1948 and acted as a distributor for some of the respondents went into bankruptcy in 1951 (206b). Respondent manufacturers' sales of sea stores tobacco in the port of Philadelphia in 1956 (the year of

5. Although petitioner's evidence was that in July and again in August he had similarly sent such letters to Reynolds and Lorrillard, petitioner was unable to produce copies of any letters either to Reynolds or to Lorillard and respondents' evidence, including the records of the United States Post Office concerning registered mail letters in August, showed that no such letters were sent or received (321b, 326b-328b; 386b; 424b-426b, 651b; 653b-654b; 656b; Ex. R-15, 764b).

petitioner's applications) had increased over 1955 as follows (249b, 252b, 255b-258b, 262b):

Philip Morris (one outlet)	48.3%
American (one outlet)	25.0%
Liggett & Myers (one outlet)	25.0%
Reynolds (two outlets)	13.7%
Lorillard (two outlets)	11.3%

There was no showing why, in the face of such marked growth, any manufacturer needed another outlet—particularly one so inexperienced as petitioner.

After a 22-day trial the jury disagreed,[6] and the trial court subsequently granted respondents' motions for judgment under F. R. C. P. 50(b). At the argument petitioner had conceded that if there was no evidence to sustain a damage verdict there was no basis for injunctive relief and its case must fall. Accordingly the trial court, finding no evidence from which a jury could reasonably infer that petitioner had been damaged, declined to state any view on the sufficiency of the evidence to prove a conspiracy. The Court of Appeals for the Third Circuit affirmed, unanimously, holding that petitioner had failed to make out a *prima facie* case of conspiracy.[7]

6. The jury was unable to agree on the answer to the first of seven interrogatories submitted to it, which asked: "Did plaintiff have such business or property as to entitle it to maintain this action?" It was therefore discharged without reaching the subsequent interrogatories relating to conspiracy and damage.

7. The decision of the Court of Appeals is reported at 297 F. 2d 199.

ARGUMENT.

Having failed to satisfy either the jury or the courts below on the essential elements of its case[8] petitioner asserts that this Court should exercise its discretionary certiorari jurisdiction because the decision of the court of appeals conflicts with decisions of this Court and of other courts of appeals. There is no conflict. Petitioner would create conflict by attributing to the opinion below a meaning and a significance which it does not have. The court below held merely that, on the peculiar facts of this case, the circumstantial evidence did not reasonably support an inference of conspiracy. Petitioner attempts to convert that decision into a sweeping declaration of principles which, it says, places an "almost insurmountable obstacle" in the path of an antitrust plaintiff, and makes it "well nigh impossible to prove a *prima facie* case of conspiracy" (Petition, p. 13).

These consequences are said to follow from Chief Judge Biggs' discussion of the significance of consciously uniform business behavior (conscious parallelism) in the circumstances of this case. But petitioner fails to recognize that "conscious parallelism" is nothing more than a convenient label often used to describe a type of circumstantial evidence. "Its probative value in establishing the ultimate fact of conspiracy will vary case by case . . . depending on the particular business setting in which it occurs." *Att'y. Gen. Nat'l Comm. Antitrust Rep.* 39, 40.[9]

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8. The jury was not persuaded that petitioner had standing to sue, the trial court held petitioner had not proved damage, and the court of appeals held that petitioner had failed to make out a *prima facie* case of conspiracy.

9. See, to the same effect, Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 *Harv. L. Rev.* 655, 658 (1962) where the author states:

> "The point is that conscious parallelism is never meaningful by itself, but always assumes whatever significance it might have from additional facts."

Such circumstantial evidence may range from limited parallelism, such as the several refusals to deal here involved,[10] to elaborate and pervasive uniformity in a context where the reasonable expectation would be non-uniformity. It may appear in conjunction with other evidence suggestive of conspiracy or, as in this case, may stand alone in a record barren of any circumstances indicative of a conspiracy. Both the nature of the parallel conduct and its business setting must be considered in determining what, if any, inferences may be drawn from it.

Chief Judge Biggs evaluated, in its particular business setting, the probative significance of the limited parallelism here. He concluded that ". . . in this case consciously uniform business behavior of the kind shown, standing alone, is not enough to sustain a finding of conspiracy" (Appendix A, p. 10a). Moreover, his careful review of the evidence demonstrates that there were ". . . no additional circumstances which would tend to cast suspicion on the defendants' rejections of the plaintiff's applications as an exercise of independent judgment" (Appendix A, p. 11a).

The holding below is in no sense contrary to or in conflict with this Court's decision in *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U. S. 537

10. The Petition implies (p. 4) that respondents' argument in the court of appeals was limited to the contention that "conscious parallelism" was not present in this case. This implication conflicts with the facts. In their Brief in the court of appeals, respondents' discussion of conscious parallelism began as follows:

> "Plaintiff has relied upon the concept of 'conscious parallelism' in support of its position that there was sufficient circumstantial evidence to warrant submission of this issue to the jury. But the cryptic words 'conscious parallelism' have no substantive significance. When properly used, they constitute merely a shorthand reference to a particular kind of circumstantial evidence, and as such do not present a unique problem. The evidence must still be analyzed to determine whether it fairly gives rise to a reasonable and logical inference of conspiracy. If it does not, plaintiff's case should not go to the jury."

(1954). There plaintiff showed that defendants uniformly refused plaintiff's request to obtain first-run pictures and adhered to an established policy of restricting the distribution of first-run pictures. Moreover, by introducing the decree in *United States v. Paramount Pictures, Inc.*, 334 U. S. 131 (1948), plaintiff had shown defendants' earlier participation in a broad national conspiracy. This Court affirmed a judgment for defendants and held only that plaintiff's evidence did not require a directed verdict in plaintiff's favor.

Similarly, the decision below is not in conflict with *Nagler v. Admiral Corp.*, 248 F. 2d 319 (2d Cir. 1957) and *Bordonaro Bros. v. Paramount*, 176 F. 2d 594 (2d Cir. 1949). *Nagler* concerned the sufficiency, at the pleading stage, of a complaint charging consciously parallel conduct and thus did not involve determination of whether such conduct, evaluated in the light of its business setting as shown by evidence adduced at a trial, was sufficient circumstantial evidence to support an inference of conspiracy.[11] *Bordonaro*, as Chief Judge Biggs noted, presented a factual situation in "striking contrast" to the factual situation here (Appendix A, pp. 10a-11a). That contrast is apparent even from petitioner's brief description of the *Bordonaro* facts (Petition, p. 9); further, the *Paramount* decree was also in evidence in that case.

The claimed conflict with *Standard Oil Co. v. Moore*, 251 F. 2d 188 (9th Cir. 1958) and *Flintkote Co. v. Lysfjord*, 246 F. 2d 368 (9th Cir. 1957) is equally illusory. In those cases, as here, the court evaluated the probative significance of the evidence. There the court concluded that an inference of conspiracy was permissible although, on other grounds, judgments for plaintiff were reversed. But the inference was supported, in those cases, by evidence highly

11. *Hathaway Motors v. General Motors Corporation*, 18 F. R. L. 283 (D. Conn. 1955), cited in *Nagler* and referred to in the Petition (page 9, n. 9), is simply another case decided at the pleading stage.

suggestive of conspiracy and vastly different from the evidence here.

The decisions which petitioner cites from the Courts of Appeals for the Fourth and Fifth Circuits likewise present no conflict with the decision below. In *Paramount Film Distributing Corp. v. Applebaum*, 217 F. 2d 101 (5th Cir. 1954), another case involving the motion picture industry, judgment was entered for one defendant because its refusal to deal, viewed in its business setting, did not reasonably lead to the inference that it had conspired with other defendants who had also refused to deal with plaintiff. Since a new trial was granted as to the other defendants, the court did not comment in any detail on the conscious parallelism and "other activities" which it regarded as sufficient to warrant an inference of conspiracy against them. *Pittsburgh Plate Glass Co. v. United States*, 260 F. 2d 397 (4th Cir. 1958) [12] involved both an actual agreement to fix prices and PPG's knowledge of and action in conformity with that agreement.

The cases cited by petitioner simply differ from this case on their facts, or are not in point. As the court below made clear, it had no intention to and did not depart from its own earlier decisions where, in different factual settings, it held consciously parallel business behavior to be a significant link in the chain of circumstantial evidence proving a conspiracy. *Wm. Goldman Theatres, Inc. v. Loews, Inc.*, 150 F. 2d 738 (3d Cir. 1945), *cert. denied*, 334 U. S. 811 (1948); *Ball v. Paramount Pictures, Inc.*, 169 F. 2d 317 (3d Cir. 1948), *cert. denied*, 339 U. S. 911 (1950); *Milgram v. Loews, Inc.*, 192 F. 2d 579 (3d Cir. 1951), *cert. denied*, 343 U. S. 929 (1952).

The unanimous opinion of the court below announces no new legal theories. Review by this Court would serve no purpose other than to provide petitioner with still an-

12. This Court, in affirming [360 U. S. 395 (1959)], dealt only with the availability of grand jury testimony.

other forum to scrutinize the extensive evidence and determine what inferences were reasonably permissible under the peculiar and particular facts of this case. Accordingly the petition should be denied.

Respectfully submitted,

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